

From: SkipOliva27@aol.com@inetgw
To: Microsoft ATR
Date: 1/27/02 11:12pm
Subject: Microsoft Settlement

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January 26, 2002

Ms. Renata B. Hesse
Antitrust Division
U.S. Department of Justice
601 D Street, N.W.
Suite 1200
Washington, D.C. 20530-0001

Dear Ms. Hesse:

On behalf of myself, I respectfully submit the following public comment on the Proposed Final Judgment in the case of United States of America, et al. v. Microsoft Corporation, District of Columbia Civil Action No. 98-1232.

The District Court is entitled to consider the "impact" of the proposed judgment on "the public generally". Under that broad criterion, the proposed judgment clearly fails to meet even a superficial test for serving the public interest. Rather, the proposed judgment is based on the Court's acceptance of an incorrect and fraudulent premise, as initially set forth by the United States in its complaint, and applies the antitrust laws of the United States in a manner inconsistent with its intent and practical scope. In addition, the proposed judgment assumes that the "public" is incapable of asserting its self-interest in the absence of government action, a presumption that is offensive on a personal level and an expression of bad public policy.

In reviewing the proposed judgment and the accompanying Competitive Impact Statement ("CIS"), the United States offers no verifiable claim that any action taken by Microsoft harmed consumers or the public interest. What they do offer is a narrative describing the failure of Microsoft's competitors to provide a product that the public supported, through the mechanism of the free market, to the extent that the competitors could maintain a profitable enterprise. This failure by Microsoft's competitors does not, however, constitute something that is detrimental to the consuming public.

The central thesis to the government's case is the belief that Microsoft enjoys a "monopoly" in the operating system market. This is an incorrect belief, the prior findings of the District Court and the United States Court of Appeals to the contrary notwithstanding. Microsoft has never enjoyed a monopoly in the operating system market, or any other market it has competed in for that matter. In the most fundamental sense, a "monopoly" is an entity which enjoys an exclusive license to trade in a particular market. Such a "license" can only be granted by the affirmative act of a government entity. Microsoft does not, and has never, enjoyed such a government license to monopolize the operating system market.

The United States has confused Microsoft's position of relative dominance as constituting a monopoly. They betray this logic at numerous points in the proposed judgment and CIS. For example, on page 25 of the CIS the United States claims the proposed judgment will allow computer manufacturers freedom from "coercion or retaliation by Microsoft." This is an absurd claim. Coercion is defined as employing a threat of force against an individual to force them to act against their self-interest. There is no evidence that Microsoft can use "force" against anyone. It does not possess a police force, or an army, or a court system. Microsoft has no means to exert its will to the extent that it violates the rights of another. What the company has done is use legitimate and legal tactics, including the "retaliation" the government improperly condemns, to aggressively compete within the market.

The market within which Microsoft competes has, in fact, been misidentified repeatedly by the government, the District Court, and the Court of Appeals. According to the CIS, the market for monopolization purposes is supposedly restricted to operating systems used on Intel-compatible personal computers. The United States deliberately excludes operating systems on non-Intel compatible computers because, the CIS says, "consumers are very reluctant to substitute away from Intel-compatible personal computers" because to do so would entail incurring substantial costs and would not result in a satisfactory substitute. Thus we have a real gap in logic. If the consumer is not substituting a non-Intel computer for an Intel computer based on considerations of price and quality, is that not a consumer choice? The free market is defined by the choices made by consumers. The government takes a contradictory and irrational approach, defining the "market" in such a limited way as to make the definition arbitrary and capricious.

I have been a computer user for more than a decade. In that time I have often weighed the option of purchasing Intel-compatible computers over non-Intel models. My choice has weighed a number of factors, including price, availability of application software, quality of the components used and even aesthetics. My ultimate decision is not important; what is important is that I considered models across the market "without regard for the government's arbitrary and exclusionary definition" and made an informed and voluntary choice. Millions of other consumers have done likewise, and the government's claims here are an attempt to deny this fact.

Similarly, on the many Intel-compatible computers I have purchased through the years, there have been times where

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I have declined to use a Microsoft operating system. I did so irrespective of the fact that a Microsoft OS was pre-installed and programmed to boot with the computer. As an informed consumer I made the effort to consider other operating systems and install one independently. The proposed judgment here assumes I am incapable of that action, for it assumes such an act would only be undertaken if multiple operating systems were made available to me at the time of purchase. Similarly, the proposed judgment presumes the presence of desktop icons will help non-Microsoft middleware programs compete with Microsoft programs; in fact millions of computer users already do so without such manipulative prompting at the behest of the government. For the government to state otherwise is illogical, offensive, and not in the public interest.

Additionally, the proposed judgment is not in the public interest because it would inflict a manifest injury against the rights and liberties of the people of the United States, specifically the right of private property. A key component of the proposed judgment's remedy is a requirement that Microsoft make its source codes available to a government-sanctioned oversight committee, which in turn is supposed to ensure these same source codes are made available to non-Microsoft middleware producers, so that these companies can create products to compete with Microsoft. Since the United States would retain the right, under the proposed judgment, to determine and enforce the scope to which these source codes are to be made available, the final judgment constitutes a seizure of private property the source codes and its subsequent conversion to a public good. Such an act is wholly incompatible with the Constitution of the United States and even the antitrust laws that are supposedly being enforced in this case.

From a practical standpoint, the antitrust laws were designed to impose static remedies upon static industries where the market and its competitive components could be easily quantified and centrally managed. The software industry is neither static nor easily quantified. It is a dynamic marketplace of ideas and innovation, and such an entity cannot be centrally managed or overseen in a rational manner. Even the Court of Appeals admitted as much in its review of this case last year, noting that the software industry would continue to evolve many times before this case was concluded. This evolution continues regardless of Microsoft's dominance of the Intel-compatible OS market, but it will not continue if extensive government oversight is introduced into the marketplace. This proposed judgment unreasonably attempts to dictate the competitive balance in an industry where such a concept has been rendered virtually meaningless. Software is not like the railroads or petroleum refining. Any individual can use their mind and inexpensive equipment to write an operating system, develop a word processing program, or even lay the foundation for a global information network. The entire barriers to entry analysis employed in the CIS for this case is thus completely without merit.

The proposed judgment seizes Microsoft's property for the express purpose of enhancing Microsoft's competitors. Such an act should offend every American who owns private property of any kind, because if a large and successful corporation is not entitled to the fruits of its own labor, than what hope is there for the ordinary American citizen of less affluent means? The proposed judgment, rather than serving the public interest, will only serve to undermine public confidence in the government's role as the final guarantor of private property rights.

As a concerned citizen, I urge the District Court to reject the proposed judgment and dismiss the government's complaint without further delay. Barring that unlikely action, I would encourage the United States to reconsider its position on Microsoft, and its enforcement of antitrust laws in general. This case has demonstrated the futility and harm that can result from the application of irrational and immoral public policy.

Sincerely,

Skip Oliva
2000 F Street, NW, #315
Washington, DC 20006-4217
SkipOliva27@aol.com